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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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STATE OF GEORGIA,

*Petitioner,*

v.

THOMAS MCCOLLUM *et al.*

*Respondent.*

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On Writ of Certiorari to the  
Supreme Court of Georgia

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BRIEF OF THE NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.,  
AS AMICUS CURIAE SUGGESTING REVERSAL

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**Interest of Amicus Curiae\***

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation organized under the laws of the State of New York as a legal aid society. It was formed

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\*Letters of consent from the parties to the filing of this brief have been lodged with the Clerk of Court.

to assist African Americans to secure their constitutional and civil rights through the courts. For many years, its attorneys have represented parties and appeared as amicus curiae in this Court and in the lower federal courts on a broad range of issues including both the substantive and procedural law relevant to cases of racial discrimination.

Of particular concern to the Legal Defense Fund has been racial discrimination against African Americans in the selection of juries. The Fund has represented criminal defendants raising jury discrimination on direct appeal, *e.g.*, *Alexander v. Louisiana*, 405 U.S. 625 (1972), and has represented potential African American jurors who have been excluded from jury service, *e.g.*, *Turner v. Fouche*, 396 U.S. 346 (1970). LDF attorneys handled *Swain v. Alabama*, 380 U.S. 202 (1965) and participated as amicus curiae in *Batson v. Kentucky*, 476 U.S. 79 (1986). In light of LDF's historic concern with and involvement in jury issues, we believe our views will be of assistance to the Court.

## SUMMARY OF ARGUMENT

### I.

The question of whether the use of peremptory challenges by a criminal defendant to exclude potential jurors because of their race must be decided in light of the central purpose of the Fourteenth Amendment.

### II.

In deciding the question, there are a number of competing interests embodied in the Fourteenth Amendment that must be carefully weighed. These include the right of jurors not to be excluded because of race, the right of a defendant to a fair and impartial jury free of racially prejudiced jurors, the right to a fair possibility of obtaining a representative jury, and the central role of the jury in preventing prosecutorial abuse. When these factors are given proper weight, it is clear that the same rule that bars prosecutors from excluding jurors because of their race should not automatically be applied to all defendants. It is further clear that whether white defendants can use

peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors.

### III.

Whether a *prima facie* case of racial discrimination in the exercise of peremptory challenges has been established may vary significantly depending on the race of the jurors excluded. The use of all of a defendants' peremptories to strike majority-group jurors, where it is impossible to produce a jury on which there will be no such jurors sitting, presents a far different issue than the use of peremptories to strike all minority jurors, thus producing a monochromatic jury.

## ARGUMENT

### *Introduction*

The Legal Defense Fund suggests that if the decision below is reversed, that holding should be based on the particular facts of this case, viz., the defendants are accused of a crime that involves racial animus and allegedly will use peremptory challenges to strike from the jury members of the very minority group they have been charged with victimizing.<sup>2</sup> The purpose of this brief is to bring to the Court's attention a number of concerns involved in deciding a much broader issue, viz., whether and in what way the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986) and extended in *Edmonson v. Leesville Concrete Co.*, 500 U.S. \_\_\_, 114 L.Ed.2d 660 (1991), applies to all criminal

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<sup>2</sup>A core concern of the Fourteenth Amendment's Equal Protection Clause is that the outcome of a criminal case not depend on the race of the victim or the perpetrator. This means both that a defendant not be subject to different penalties because of *his* race (42 U.S.C. § 1981), and that the victim of a crime does not lack redress because of the race of the accused. If a white defendant uses peremptories to create an all-white jury that sanctions a crime against African Americans, that result violates key Fourteenth Amendment values.

defendants when they exercise peremptory challenges.

# **I. THE PRINCIPLES UNDERLYING *BATSON V. KENTUCKY***

In *Batson* this Court turned to those "first principles" that resulted in the holding that the exclusion of African Americans from jury service violated the Fourteenth Amendment. Citing *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court held:

Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

476 U.S. at 87-88. As *Strauder* itself further explained, the exclusion of African American citizens because of their race "is practically a brand upon them, affixed by the law; an assertion of their inferiority." 100 U.S. at 308. Such a practice violates the rights of African Americans "for whose protection the [Fourteenth] Amendment was primarily designed." *Id.*, at 307.

We do not mean to suggest that a similarly *invidious* discrimination against potential white jurors might not also violate the Constitution, and *Strauder* so recognizes. *Id.*, at 308.<sup>3</sup> However, the question of whether the exclusion of members of a particular group by a defendant exercising peremptory challenges does run afoul of the Fourteenth Amendment must be determined in light of the central purpose of the Amendment and of the several distinct and potentially conflicting constitutional interests involved.

# **II. THE APPLICATION OF *BATSON/EDMONSON* TO CRIMINAL DEFENDANTS DEPENDS ON WEIGHING COMPETING FACTORS.**

Amicus urges that the resolution of this case does not simply involve the application of the state action analysis of *Edmonson*, a civil case, to a criminal prosecution. Rather, there are several different equal protection/due process

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<sup>3</sup>"If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws." *Id.*

concerns to be considered and reconciled.

### ***1. The Right of Jurors.***

Each juror has the right to be free from invidious racial discrimination when the decision whether he or she shall sit is made and enforced by the trial court. See *Batson*, 476 U.S. at 87; *Edmonson*, 114 L.Ed.2d at 676-679.

### ***2. The Right of a Defendant to an Unbiased Jury.***

A criminal defendant has the right not to be tried by a racially biased jury. *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524 (1973). Often, voir dire and challenges for cause are not enough to protect a defendant, and a minority defendant faced with the possibility of biased white jurors must have recourse to peremptory challenges.

In theory there is a distinction between a race-based peremptory challenge used to discriminate invidiously in violation of *Batson*, and a peremptory challenge used to prevent discrimination by removing a juror whom the defendant believes harbors racial prejudice. In practice,

however, it may often be difficult for the trial court to distinguish between the two cases, just as often the voir dire, if the circumstances of the case do not permit a searching inquiry into racial prejudice,<sup>4</sup> may not be able to elicit sufficient proof of bias to permit a challenge for cause. Whatever the injury to a prospective juror of being excluded from a particular jury, the injury to a defendant by being tried by a jury infected with racial prejudice is far greater.

### ***3. The Right to a Representative Jury.***

The Sixth and Fourteenth Amendments guarantee to each criminal defendant "a fair possibility for obtaining a representative cross-section of the community" on the jury that tries him. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is

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<sup>4</sup>See *Ristaino v. Ross*, 424 U.S. 589 (1976).

underrepresented to some degree, but not sufficiently to permit a challenge under the Fourteenth Amendment.<sup>5</sup> The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.

This use of peremptory challenges, we submit, is not invidious discrimination in violation of the Fourteenth Amendment. Its purpose is not, as in *Strauder* and *Batson* to *exclude* persons because of their race or to rid a jury of all members of a particular racial group because of animosity towards them (an impossible goal when it is members of the majority that are being struck), but rather to *include* persons who would otherwise not sit. While we recognize that a defendant has no absolute right to have members of his race on the actual jury that tries him in the sense that there is a violation of the Constitution if there are not,<sup>6</sup> we do submit

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<sup>5</sup>See, e.g., *Swain v. Alabama*, 380 U.S. 202, 206-09 (1965).

<sup>6</sup>*Holland v. Illinois*, 493 U.S. \_\_\_, 107 L.Ed.2d 905 (1990).

that the use of peremptories to produce a representative jury is fully consistent with both the Fourteenth and the Sixth Amendments.

### 5. *The Role of Juries in Preventing Prosecutorial Abuse.*

A jury is provided in a criminal prosecution under the Sixth and Fourteenth Amendment as a right of defendants, in part to serve as a check on prosecutorial abuse. Thus, a jury may be the only effective protection against racial discrimination by prosecutors in deciding, for example, what crime to charge or what penalty to seek. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 309-11 (1987). The likelihood that a jury will in fact perform this role may depend in part on its racial composition, i.e., to the extent it fairly represents the community as a whole by including members of the group from which the defendant comes. Where a minority group is a small proportion of the community, in a particular case the only chance of reaching minority members of the panel may be through the use of peremptory challenges to strike some members of the

majority group.

#### 6. *Summation.*

Many of the factors discussed above do not apply when a prosecutor is exercising the state's peremptory challenges. Thus, the state does not have a constitutional right to a jury trial, and it has the same interest as does the victim of a crime in ensuring that the criminal justice system operates in a race-neutral fashion. Further, 18 U.S.C. § 243 makes it a federal crime for a state officer "charged with any duty in the selection . . . of jurors" to exclude any citizen "on account of race." By its literal terms, the statute applies to the use of peremptory challenges by a prosecutor to exclude African Americans because of their race.

In addition, when these various factors are weighed, it is apparent that whether and to what extent the *Batson/Edmonson* rule applies to criminal defendants will depend greatly on the circumstances of the particular case. For a white defendant to practice invidious discrimination by striking all African Americans from the jury that will try him

for a racially motivated crime against an African American, presents different issues from the case of an African American defendant who uses peremptories in an attempt to have some members of his race on the jury that will try him. As we will now demonstrate, these different circumstances also will result in differences in the way *Batson* is applied in practice.

### III. THE APPLICATION OF *BATSON/EDMONSON* IN PRACTICE.

Assuming that *Batson* does apply in some way to the use of peremptories by a criminal defendant, there are three key considerations affecting whether the use of peremptories creates a prima facie case, as well as the weight of that case and what considerations are sufficient to overcome it. In some cases, a finding of even a prima facie case would be clear error, while in others the prima facie case would be so compelling that it could only be overcome with extraordinary

evidence.<sup>7</sup>

*First*, if a venire is ninety per cent white, or other majority group, one would expect that peremptories exercised without regard to race would be mostly against whites. For example, if a litigant used ten peremptories against ten whites, that could happen by chance in a significant number of instances. Therefore, no inference of discrimination could be drawn from that fact alone. If, on the other hand, a litigant used ten peremptories against ten African Americans where the venire is ninety per cent white and ten per cent African American, a strong inference of discrimination could be drawn.<sup>8</sup>

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<sup>7</sup>See *Alexander v. Louisiana*, 405 U.S. 625 (1972) for one of many examples of an irrefutable case of jury discrimination made by a clear pattern of exclusion coupled with the opportunity to discriminate based on race. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"), and *id.* at n. 13.

<sup>8</sup>If peremptories were exercised randomly, one would expect that nine would be used against whites and one against African Americans. The use of one more peremptory against whites for a total of ten is not a substantial deviation from what one would expect; the use of all ten against African Americans is, however.

*Second*, a related factor is whether the litigant was in a position to and did he actually produce a one-race (or virtually one-race) jury. If a litigant uses peremptories to sweep all minorities from the venire, the "monochromatic result" can establish a prima facie case. *Alexander v. Louisiana*, 405 U.S. at 632. Conversely, if a litigant is sure to get a jury that is heavily white no matter how peremptories are used, the litigant is likely to have been using strikes for some other reason other than race.

*Third*, whether the excluded jurors were members of an historically discriminated against group, and particularly a group historically underrepresented on jury rolls, is highly significant. Thus, a purge of all African Americans from a jury sitting in Mississippi<sup>9</sup> or all Hispanic Americans from a jury sitting in Texas<sup>10</sup> is far more probative of invidious discrimination on the part of the litigant (or his or her

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<sup>9</sup>*Patton v. Mississippi*, 332 U.S. 463 (1947)(no African Americans called for jury service within the last thirty years).

<sup>10</sup>*Hernandez v. Texas*, 347 U.S. 475 (1954)(no Hispanic Americans called for jury service for last twenty-five years).

attorney) than the striking of some whites in Minnesota.

Not only is establishing a prima facie case where the defendant's group is a minority in the community and on the jury rolls far more difficult and problematic, but the rebuttal of a prima facie case even when made is a lesser burden than when a prosecutor or a private litigant strikes minority jurors. With regard to a prosecutor, *Batson* makes it clear that the use of peremptories to exclude minority jurors because of preconceptions about how they would decide a case can never be justified. A minority defendant, however, is powerless to purge the jury of whites; the only possible uses of the peremptory against potential white jurors are either to strike those for whom some basis for suspecting bias exists, or to attempt to reach African Americans on the venire so that they may sit on the jury. Neither purpose is either invidious nor unconstitutional, but is related to the compelling state interest of providing the defendant with a jury that represents the community and is truly fair and impartial.

## CONCLUSION

The considerations set out in this brief militate against a decision that treats all defendants, whether white, African American, or other minority, as if their circumstances are necessarily the same. A holding that *Batson v. Kentucky* prohibits the respondents here from striking African Americans from the jury that will try them does not compel a broader ruling.

For the foregoing reasons, amicus suggests that the decision of the court below should be reversed, but the basis of that reversal be limited to the facts of this case.

Respectfully submitted,

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